

ESA Regulatory Reform: Final Rule Governing Incidental Take Statements Questions and Answers

What action is being taken?

The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (together, the "Services"), the two federal agencies responsible for administering the Endangered Species Act (ESA), are finalizing a rule to amend the regulations governing Incidental Take Statements (ITSs) for endangered and threatened species under section 7 of the ESA.

The changes will address two issues:

1. The use of "surrogates" to express the amount or extent of anticipated take in an ITS; and,
2. ITSs for "programmatic" federal actions.

Why did the Services make these changes?

These changes will clarify and codify the current policy of the Services regarding the use of surrogates, and will address recent court decisions related to ITSs for programmatic federal actions. These changes will also allow for flexibility in how the Services issue an ITS in situations when quantifying take of endangered or threatened species may not be appropriate.

What are Incidental Take Statements?

Under section 7 of the ESA, when federal agencies conduct actions (e.g., issue a permit, provide funding, undertake construction projects, etc.) that are likely to adversely impact threatened or endangered species, they must formally consult with the Services. The outcome of formal consultation is transmitted to the federal agency by the Services in the form of a biological opinion.

A biological opinion is often accompanied by an ITS. The ITS expresses the amount or extent of anticipated "take" (e.g. death, injury, harm or harassment) of listed species caused by the proposed action and provides an exemption from the ESA section 9 prohibitions on such take. The section 9 exemption provided in the ITS is contingent on the federal agency and any applicant complying with reasonable and prudent measures and terms and conditions provided in the ITS.

How are surrogates used in the development of an Incidental Take Statement?

The Services have found that in many cases, the biology of a listed species or the nature of the proposed action makes it difficult to detect or monitor take of individual animals. Additionally, the impact of proposed actions to some species may not be in the form of direct or immediate mortality to affected individuals, but rather a reduction in their biological fitness. For example, a decrease in fitness may occur if habitat loss or degradation likely to be caused by the proposed federal action results in less food available to individuals of the listed species. In those cases, impacts to a "surrogate" such as habitat, ecological conditions or a similarly affected species that

is easier to monitor may be the most reasonable and meaningful measure of assessing and monitoring anticipated take of listed species.

What is a practical example of using surrogates?

Timber harvest within habitat of the threatened northern spotted owl can cause take by modifying habitat conditions that significantly disrupt the owls' nesting, roosting and foraging behavior. Although the number of spotted owls likely to be taken as a result of a project can be estimated, detection and monitoring of the affected owls to determine when take has occurred or when the take limit has been reached is not practical because: 1) spotted owl ranges average about 3,000 acres, and injured or dead owls are frequently quickly removed by predators and scavengers, making them very difficult to count; and 2) the impact to the spotted owl is primarily in the form of reduced fitness of adult owls, leading to reduced survival and reproductive potential.

Documenting this reduction is very difficult, and doing so may take months or years at considerable expense. However, effects to habitat are much easier to observe and can be readily monitored. Thus, using the number of acres of spotted owl habitat removed as a surrogate for numbers of spotted owls in order to express the extent of anticipated take and to monitor the impacts of take on the species is a practical alternative.

What is the regulatory change that addresses the use of surrogates?

The Services are finalizing an addition to section 402.14 of the regulations that implement section 7(b)(4) of the ESA to codify the use of surrogates to express the amount or extent of take in an ITS. Under this addition, the Services will be able to use surrogates in ITSs, provided the following conditions are met:

1. The ITS describes the causal link between the surrogate and the take of the listed species;
2. The ITS describes why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and,
3. The ITS sets a clear standard for determining when the level of anticipated take of the listed species has been exceeded.

What if there is sufficient information to quantify the precise number of affected individuals anticipated to be taken?

Quantifying the anticipated amount or extent of take is only one side of the equation. It must also be possible and practical to detect and monitor the take of individuals to ensure that the exempted take level is not exceeded. If the anticipated take of listed species is quantifiable in terms of affected individuals, but the monitoring of that take is not practical, the regulation allows the Services to express the amount or extent of anticipated take using a surrogate for which the impacts of take can be readily detected and monitored. However, if using the precise numbers of individuals to quantify and monitor take is feasible, then the Services will do so.

What are “framework programmatic actions” and how are they being addressed?

Under the regulatory changes, a “framework programmatic action” is defined as a federal action that provides a framework for the development of future action(s) that are authorized, funded, or

carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are implemented.

Such programs may include a collection of activities of a similar nature, a group of different actions proposed within a specified geographic area, or an action adopting a framework for the development of future actions. Those future actions may be developed at the local, state or national scale and will occur later in time. Examples of federal programs that provide such a framework include land management plans prepared by the Forest Service and the Bureau of Land Management and the U.S. Army Corps of Engineers' Nationwide Permit Program.

Under this final rule, the Services are recognizing their authority not to provide an ITS with a biological opinion that only addresses a framework program that is only establishing the structure of future actions. Due to the nature of the action, no take results when a framework programmatic action is adopted. Adoption of the program itself, by definition, only establishes a framework for later action. For these subsequent actions that will be authorized consistent with the terms of the program and may affect listed species, later consultations under the ESA will occur. However, if incidental take is reasonably certain to occur and the proposed action is compliant with the requirements of section 7(a)(2), then an action-specific ITS will be provided that ensures any incidental take from the subsequent action under the program is addressed.

This approach for addressing framework programmatic actions advances the policy goals of the Services to focus the provision of ITSs at the action level where such take will result. Consistent with that focus, if a decision adopting a framework also includes decisions authorizing actions (that is, actions for which no additional consultations or incidental take authorization will be necessary), then an ITS would be necessary for those actions. The Services have included recognition of this circumstance in the regulatory definition of the term "mixed programmatic action" in the regulations.

For other types of programmatic actions not falling within the definitions provided in the rule, incidental take statements will be formulated by the Services to accompany biological opinions where incidental take is reasonably certain to occur and the proposed federal action is compliant with the requirements of section 7(a)(2).

The new definitions draw distinctions between these types of programmatic actions based on the extent to which those programs do or do not require subsequent federal approvals and section 7 consultation for the terms of the program to be carried out.

If a framework programmatic action does not result in immediate take of a listed species, does a federal agency still have to consult?

Yes. The regulations regarding provision of an incidental take statement for framework programmatic actions does not undermine the duty to consult under section 7 of the ESA. Framework programmatic actions will trigger formal consultation if the action may affect listed species or their designated critical habitat.

If take is not quantified how can a jeopardy or adverse modification determination be made?

An incidental take statement is not provided with a biological opinion on a framework programmatic action on the basis that no take will result at the programmatic stage. However, the associated biological opinion can nevertheless address indirect effects of the program's implementation.

Unlike the purposes of an incidental take statement, the analysis in a biological opinion is used to determine whether an agency action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. The analysis in a biological opinion allows for a broad-scale examination of a program's potential impacts on a listed species and its designated critical habitat.

The provisions of an ITS, including the amount and extent of take and any terms and conditions required to implement the reasonable and prudent measures, necessarily must be specific to ensure they can be followed and allow for a determination of when they have been exceeded. Biological opinions on programs often examine how the parameters of the program align with the survival and recovery of the listed species. This approach reflects the different statutory purposes that the two related but separate documents were intended to address.

How will a federal agency know when reinitiation of consultation on a framework programmatic action is triggered if an ITS is not provided? Where the action agency retains discretionary involvement or control, the existing regulations require reinitiation when: 1) new information reveals the effects of the action may affect listed species or critical habitat in manner or to an extent not previously considered; 2) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or 3) if a new species is listed or critical habitat designated that may be affected by the identified action.

Additionally, while an ITS may not be provided for a framework programmatic action, when an action under the program is authorized and may affect listed species, the subsequent section 7 consultation that occurs will provide an ITS with specific reinitiation triggers that identify when reinitiation should occur.

Is “reasonably certain” a new standard for determining take?

The modification in the 402.14(g)(7) regulation regarding when the Services formulate an ITS from “...if such take may occur” to “...if such take is reasonably certain to occur”, is not a new standard. It is merely a clarification and codification of the applicable standard that the Services have already been using and is consistent with prior case law. Such a standard does not require a guarantee that take will result, only that the Services establish a rational basis for a finding of take. This is not a high bar to meet and the Services will continue to rely on the best available scientific and commercial data, as well as their professional judgment in reaching these determinations and resolving uncertainties or information gaps.

What process was used to formalize these changes?

The Services proposed a draft rule to revise the regulations that published in the *Federal Register* on September 4, 2014. The Services solicited public review and comment on the proposed changes for a period of 60 days that closed on November 4, 2013. The Services reviewed and

considered all public comments in preparing the final rule on this action. The final rule includes a section that identifies and responds to substantive comments received from the public.

Could these new changes to the regulations cause less protection for listed species?

No. These changes do not alter the obligation of federal agencies to ensure their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat in accordance with the requirements of Section 7(a)(2) of the ESA. Neither do these changes alter the authority of the Services to require implementation of reasonable and prudent measures and terms and conditions in ITSs to minimize and monitor the impacts of anticipated take on the listed species in accordance with section 7(b)(4) of the ESA and the implementing regulations for section 7.

Action agencies often seek to engage in consultation on programmatic actions to gain efficiencies in the section 7 consultation process. The Services anticipate the approach adopted for incidental take statements for the different types of programmatic actions will afford action agencies and the Services with substantial flexibility to efficiently and effectively conduct consultation, while ensuring compliance with responsibilities under the ESA.

What are the benefits of these changes?

They will provide more clarity, flexibility and efficiency around the development and implementation of ITSs. These changes are expected to reduce delays, litigation and conflict associated with implementation of the ESA. These changes clarify and streamline the regulatory process governing ITSs while still providing the best possible protections for listed species.

How will these changes affect ITSs accompanying biological opinions?

These regulations will apply to ITSs provided with biological opinions that are issued after the effective date of the final rule. Ongoing federal actions that are subject to biological opinions and ITSs issued prior to the effective date of the final rule, but where reinitiation of formal consultation is warranted, will also fall under the purview of these regulation changes.

Where can more information be found?

For more information, please visit: http://www.fws.gov/endangered/improving_ESA/ITS.html.

The final rule was delivered to the *Federal Register* on May 1, 2015. The final notice will be available upon publication in *Federal Register* at www.fws.gov/policy/frsystem/default.cfm by clicking on the 2015 Final Rules link under Endangered and Threatened Wildlife and Plants.